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Supreme Court of the United States

October Term, 1958

THE DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY,

Petitioner,

against

GLENN C. SIEGRIST,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO THE GRANTING OF PETITIONER'S PRAYER FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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The respondent, Glenn C. Siegrist, respectfully urges the denial of petitioner's prayer that a writ of certiorari issue to review that part of the order in the United States Court of Appeals for the Second Circuit entered on February 18, 1959, which remanded the cause for a new trial rather than directed entry of judgment for defendant-petitioner.

Opinion Below

The opinion of the United States Court of Appeals for the Second Circuit, reported at 262 F. 2d 616, is annexed as an appendix. No opinion was rendered in the District Court.

Jurisdictional Statement

Petitioner seeks review of an order of the United States Court of Appeals, entered February 18, 1959, which reversed a judgment of the United States District Court for the Western District of New York for plaintiff-respondent and remanded for a new trial. Review is sought of so much of said order as called for a new trial rather than dismissal of the complaint, on the ground that in so remanding, the Court of Appeals departed in principle from decisions of this Court, and further because the procedural question involved has not been, but should be, decided by this Court.

Question Presented

Should the Court of Appeals have directed the dismissal of the complaint, rather than a new trial?

ARGUMENT

POINT I

The answers to the special interrogatories were consistent with the general verdict so no matter concerning them merits the consideration of this Court.

Rule 49b of the Rules of Civil Procedure provides:

> "When the answers are inconsistent with each other and one or more is likewise inconsistent with the general verdict, the Court shall not direct the entry of judgment but may return the jury for further consideration of its answers and verdict or may order a new trial."

The answers of the jury in this case were not inconsistent with each other nor were they inconsistent with the general verdict.

The jury found that the plaintiff was not in the gondola car in the performance of his duties. This answer was pertinent only to the question of the plaintiff's claim against the defendant, United States Steel Corporation. A no answer to this question required the jury, under the law, to find a verdict of no cause of action against the defendant, United States Steel Corporation, that it did.

The Federal Employers' Liability Act does not require that in order for the injured railroad worker plaintiff to recover, he must be performing some duty for the railroad when his injury occurs.

45 U. S. C. A. 51 (Federal Employers' Liability Act) provides:

> "Every common carrier by railroad * * * shall be liable in damages to any person suffering injury while *he is employed by such carrier* in such commerce * * * ."

It was undisputed upon the trial that the plaintiff was in the course of his employment when he was injured. It was undisputed that at the time he was injured he was going from one assigned task to another.

The jury's characterization of the plaintiff's riding in the gondola car at most was pertinent to the defense of contributory negligence, it could not affect the plaintiff's right to a verdict against the railroad.

> Rinehiser v. Chesapeake and Ohio Railroad Company, 354 U. S. 901.
>
> Golden v. Reading, 253 F. 2nd 567.
>
> Stinson v. Atlantic Coast Line Railroad Company, 355 U. S. 62.

These decisions go considerably further than is necessary to go in this case. In this case, the railroad employee, Siegrist, was actually engaged in a railroad operation when

he was injured. He was going from one assigned task to another assigned task by the only route available to him.

The answer of which the petitioner complains did not apply to the plaintiff's right to recover against the railroad but only applied to his right to recover against the defendant, United States Steel Corporation.

"Now if Siegrist had no business in the performance of his duties in the riding of this gondola car that would be evidence of contributory negligence. It would affect his claim against the railroad by requiring the jury to reduce his total damages proportionately as his own negligence contributed to the accident. It would be fatal to his claim against the steel company; first, because the steel company in that case would owe no duty except to refrain from intentionally injuring him, and secondly, because under the ordinary rules of negligence which are applicable to the claim against the steel company any negligence at all on the part of Siegrist, however small, which contributed to the accident is a complete bar to any recovery against the steel company. I am leaving it to you to determine from all the evidence whether in so riding on this gondola car Siegrist was engaged in the performance of his duties."—Charge of the Court.

POINT II

The Court of Appeals erred in disturbing the verdict so there is no need for this Court to establish any principle in this case concerning the duty of the Court of Appeals to direct dismissal of the complaint.

Obviously, the railroad employee plaintiff in the Ringhiser Case (Ringhiser v. Chesapeake and Ohio Railroad Company, 354 U. S. 901) "was not in the gondola car in the

performance of his duties" (language used by Judge Mone in the United States Court of Appeals opinion in the Siegrist Case).

Therefore, this Court does not require in order that a verdict be sustained that the proof show the plaintiff was injured in the performance of his duties.

The sole requirement is "That the defendant railroad was on notice actual or constructive that an employee might be riding in a car", (language used is the Court's opinion in the Ringhiser Case).

The District Judge charged in the Siegrist Case that such knowledge was needed before it could return a verdict in favor of the plaintiff.

> "Or that it was loaded in such a way that there was likelihood that its employees would be injured by the movement of the load." p.

The opinion of the United States Court of Appeals did not correctly state the applicable law when it used these phrases:

> "* * * that the railroad had notice or should have had notice that *employees such as plaintiff* used moving cars * * *

> "But one of the vital circumstances was knowledge that *plaintiff* might be in the car.

> "In short, the error was in the failure to charge that the jury must first determine whether there were any facts from which the railroad should have known that the moving gondola car was a place in which *the plaintiff* might be riding."

The law is that the railroad must be on notice actual or constructive that an employee might be riding in a car.

Ringhiser v. Chesapeake and Ohio Railroad Company, 354 U. S. 901.

The law does not require that the railroad have notice that this plaintiff was likely to ride in a car or that railroad employees doing the same job or in the same job category were likely to ride in a car. The law says *an employee* not a particular employee or a particular type of employee.

The car in which the plaintiff was riding at the time he was injured was on track number one. This track was a switching track (Defendant railroad's witness M. Peiffer, Page 239).

It, of course, follows from the testimony that track number one was a switching track that the railroad had actual knowledge that its employees would be riding on and in cars on that track. The switching operation of necessity required that railroad employees ride on and in cars.

The jury had every right to infer that the designation by the railroad of track number one as a switching track supplied the necessary notice element. This reasonable inference gave validity to the verdict of the jury and it should not have been reversed.

POINT III

Conclusion.

For the reasons stated, the respondent prays that the petition of the Delaware, Lackawanna & Western Railroad Company for a writ of certiorari to review the order of the United States Court of Appeals for the Second Circuit entered in this cause on February 18, 1959, and that said order be modified to provide for the dismissal of the complaint herein be denied.

Respectfully submitted,

WILLIAM J. FLYNN, JR.,
EDWARD J. DESMOND,
JOHN E. DRURY, JR.,
Attorneys for Respondent,
Glenn C. Siegrist.

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 39—October Term, 1958.

(Argued October 24, 1958 Decided February 18, 1959.)
Docket No. 25094.

GLENN C. SIEGRIST,
Plaintiff-Respondent,

v.

DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY,
Defendant-Appellant.

and

UNITED STATES STEEL CORPORATION,
Defendant.

Before: SWAN and MOORE, *Circuit Judges*, and KAUFMAN, *District Judge*.

Appeal by defendant, Delaware, Lackawanna & Western Railroad Company from a judgment in favor of plaintiff entered on a jury verdict in the United States District Court for the Western District of New York, Burke, *D. J.*, in an action for personal injuries brought under the Federal Employers' Liability Act, 45 U. S. C. A. 51 *et seq.*

Reversed and remanded for a new trial.

JOHN E. DRURY, Esq., Buffalo, N. Y. (Desmond and Drury, Buffalo, N. Y., on the brief), for Plaintiff-Respondent, Glenn C. Siegrist.

HUGH McM. RUSS, Esq., Buffalo, N. Y. (John L. Truscott, Esq., Hodgson, Russ, Andrews, Woods & Goodyear, in the brief), for Defendant-Appellant, Delaware, Lackawanna & Western Railroad Company.

MOORE, *Circuit Judge*:

Defendant (appellant), Delaware, Lackawanna & Western Railroad Company (referred to as "the railroad"), appeals from a judgment in favor of plaintiff in an action against the railroad and the United States Steel Corporation to recover for personal injuries sustained as a result of their alleged negligence. The action was brought against the railroad under the Federal Employers' Liability Act (F. E. L. A.), 45 U. S. C. A. 51 *et seq.* Judgment was entered against the railroad after trial before the court and a jury which found upon specific questions submitted by the court: (1) that the accident was caused in part by negligence of the railroad; (2) that plaintiff's negligence contributed to the accident; (3) that plaintiff's negligence contributed 25% to the accident, that damages were $100,000 and that the verdict against the railroad was $75,000; and (4) that plaintiff was not in the gondola car (where he was injured) in the performance of his duties. Judgment was directed in favor of the United States Steel Corporation upon the written answers of the jury to the special questions submitted by the court.

The restricted area of review in injury cases brought under the F. E. L. A. does not include a redetermination of the jury's findings on factual issues. However, it is

within the province of the appellate court to examine the record to ascertain whether the jury's determination was made upon adequate instructions as to the applicable principles of law.

Plaintiff on the night of December 20, 1951 was employed by defendant as a car inspector. His duties were two-fold. First, when a freight train arrived in the Buffalo yard he was to check the condition of the running gear, the journal boxes and brakes. To do this he had to walk along the side of the train, inspecting each car. Second, when not so engaged he was to inspect empty box cars and classify them as to the commodities they were best suited to carry. He was not required to classify gondola or open cars. On this particular night plaintiff and a fellow employee named Schultz, while waiting for the arrival of a freight train, were engaged in car commodity classification. This work also required plaintiff to walk alongside the box cars being inspected. Engaged in this task, plaintiff was walking on one side of the cars, Schultz on the other. There was a substantial amount of snow on the ground. While this classification work was in progress the cars commenced to move because of a switching operation so that plaintiff and Schultz had to discontinue this work. Schultz continued on foot, but plaintiff, desirous to avoid walking through the snow, and to get a ride to his destination, swung up on to the stirrup of a moving gondola car. The stirrup was slippery so plaintiff then climbed into the car. He thought the car was empty and walked to the forward end, but near the end of the gondola he felt a step down indicating a difference in level. As he was standing in this depression at the end of the car he heard the clicking sound of cars taking up slack, a sign that the train was stopping. The train did come to an abrupt stop caus-

ing steel plates loaded in the car to shift forward and pin plaintiff's right leg between the plates and the end of the car.

Plaintiff sued the railroad for negligence under the provisions of the F. E. L. A. and the United States Steel Corporation for negligence in that he was struck and his leg injured by a shifting load on a train.

A railroad is under a duty to use due care to provide its employees with a safe place in which to work. The area in which plaintiff was required to work was on the paths alongside the tracks from which he could perform his inspection duties. The accident, however, did not occur in this area. No part of his duties called for his being in a gondola car at any time or to hitch rides on moving cars. In fact plaintiff admitted that he was familiar with the railroad's rule which reads "Keep off cars and engines except in performance of duty."

In enacting the F. E. L. A. Congress did not provide that a railroad should be liable in damages for any injury suffered by an employee but only for those injuries resulting in whole or in part from its negligence. Congress did not define "negligence" for purposes of the Act. In *Urie v. Thompson*, 337 U. S. 163 (1949), the court, said, speaking of 45 U. S. C. A. 51 which governs this case:

> "The section does not define negligence, leaving that question to be determined, as the Missouri Supreme Court said, 'by the common law principles as established and applied in the federal courts.' 352 Mo. at 248. *Erie R. Co. v. Tompkins*, 304 U. S. 64, has no application. * * * Federal decisional law formulating and applying the concept governs * * *" (p. 174).

The principle, however, merely confines this court to Federal, as opposed to New York, law in construing the

term. As the Supreme Court said in a later case, *Morissette v. United States*, 342 U. S. 246 (1952):

> "And where Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed. In such case, absence of contrary direction may be taken as satisfaction with widely accepted definitions, not as a departure from them" (p. 263).

Negligence, however, implies a duty. The duty was to provide a safe place to work. There is no evidence that plaintiff's work area was in any way unsafe. To bring this area into the field for which the railroad might be responsible requires an extension of the area into the gondola car in which the injury occurred. Therefore to extend plaintiff's work area into the gondola car the jury under appropriate instructions addressed specifically to this point must determine that the railroad had notice or should have had notice that employees such as plaintiff used moving cars as a means of locomotion from one part of the freight yard to another thus enlarging plaintiff's work area to the interior of the gondola. The doctrine of notice was especially emphasized by the Supreme Court in *Ringhiser v. Chesapeake & Ohio Railway Co.*, 354 U. S. 901 (1957), in which the majority said that there was evidence "'that to respondent's knowledge employees used gondola cars for the purpose.'" This essential ingredient was further stressed by the comment that "there were probative facts from which the jury could find that respondent was or should have been aware of conditions which created a likelihood that the petitioner would suffer just such an injury as he did."

The verdict here, however, does not rest upon such a charge. The trial court charged that the railroad owed a duty to conduct its operations including the switching of its trains and the carrying of freight in a manner reasonably safe under all the circumstances of the case. But one of the vital circumstances was knowledge that plaintiff might be in the car. The mere abrupt stop or the shifting of the steel absent plaintiff would not have given rise to liability any more than the presence of a large or loose stone on a roadbed footpath would have done so. It was the fact that the loose stone was in a work area which the plaintiff had to traverse in connection with his duties so that he was likely to step on it which created the liability in *Gibson v. Thompson*, 355 U. S. 18 (1957). See also, *Ferguson v. St. Louis-S. F. R. Co.*, 356 U. S. 41 (1958).

The trial court also charged that the railroad had a duty to inspect freight shipments to see that they were properly loaded and related this duty to that of providing its employees with a safe place to work. The misconception that such a charge might well have created in the minds of the jury was that the gondola car was an area in which the railroad knew that plaintiff might be. In short, the error was in the failure to charge that the jury must first determine whether there were any facts from which the railroad should have known or be presumed to have known that the moving gondola car was a place in which plaintiff might be riding. Had the jury made such a fact finding in plaintiff's favor then but only then would the gondola car have been brought within the safe work area rule. The jury actually found that plaintiff was not in the gondola car in the performance of his duties. Had the jury also found that the railroad was not on notice, actually or constructively, that an employee might be riding in a car the verdict

upon a charge containing this element might well have been different.

Nor was the notice requirement merged into contributory negligence by plaintiff's willful violation of the "Keep off cars * * *" rule. Such a violation could be considered in determining contributory negligence but first the jury had to reach a conclusion as to liability under applicable principles of law.

The judgment against defendant Delaware, Lackawanna & Western Railroad Company should be reversed and the case remanded for a new trial.

SWAN, *Circuit Judge* (dissenting):

Since the jury found that plaintiff was not in the gondola car in the performance of his duties, and since there was no evidence that the company rule had ever been violated before, I see no reason for the trial judge to have charged on the subject of notice to the company that an employee might be riding in the gondola. In my opinion plaintiff's (*sic.*) motion to dismiss the complaint should have been granted.